

Admin.

December 12, 2000

**First Supplement to Memorandum 2000-77****Annual Report: Unconstitutional Statutes Report**

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The staff draft of the Report on Statutes Repealed by Implication or Held Unconstitutional, which is to be included in the 2000 Annual Report, is attached to this memorandum.

The staff appreciates the assistance of Professor J. Clark Kelso of McGeorge Law School, and his students, in preparing this report.

Respectfully submitted,

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Staff Counsel

### **Report on Statutes Repealed by Implication or Held Unconstitutional**

Government Code Section 8290 provides:

The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the state or the Supreme Court of the United States.

Pursuant to this directive, the Commission has reviewed the decisions of the United States Supreme Court and the California Supreme Court published since the Commission's last Annual Report was prepared<sup>1</sup> and has the following to report:

- No decision holding a state statute repealed by implication has been found.
- Two decisions of the United States Supreme Court holding a state statute unconstitutional have been found.<sup>2</sup>
- No decision of the California Supreme Court holding a state statute unconstitutional has been found.<sup>3</sup>

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1. This study has been carried through 24 Cal. 4th 433 and 121 S. Ct. 335 (1999-2000 Term).

2. The United States Supreme Court has, for the second time, granted certiorari from a Ninth Circuit decision holding that Labor Code provisions authorizing the state to seize money and impose penalties for a subcontractor's failure to comply with prevailing wage requirements (Lab. Code §§ 1727, 1730-1733, 1775, 1776(g), 1813) violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In *G & G Fire Sprinklers, Inc. v. Bradshaw*, 204 F.3d 941 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 297 (2000), and its previously vacated opinion, 156 F.3d 893 (9th Cir. 1998), the Ninth Circuit held that the statutory scheme was unconstitutional as applied because it failed to provide either a pre- or post-deprivation hearing when payments were withheld.

3. One decision of the California Supreme Court held that Section 24, Fifth of the National Bank Act, 12 U.S.C. § 24, Fifth, as impliedly amended by Title VII and the Age Discrimination in Employment Act (ADEA), preempts the California Fair Employment and Housing Act (FEHA), Gov't Code §§ 12900-12995, to the extent of a conflict and no further. In *Peatros v. Bank of America*, 22 Cal. 4th 147, 990 P.2d 539, 91 Cal. Rptr. 2d 659 (2000), the court found that Section 24, Fifth does not preempt FEHA to the extent that, like Title VII and the ADEA, FEHA confers on officers of a national bank a right against dismissal

In *Hunt-Wesson, Inc. v. Franchise Tax Board*,<sup>4</sup> the United States Supreme Court held that the interest deduction limitation provided in Revenue and Taxation Code Section 24344 amounts to an impermissible tax of a multistate corporation's "nonunitary" income in violation of the Due Process and Commerce Clauses of the United States Constitution.

In *California Democratic Party v. Jones*,<sup>5</sup> the United States Supreme Court held that California's "blanket" primary,<sup>6</sup> in which voters can vote for any candidate regardless of party affiliation, violates a political party's First Amendment right of association.<sup>7</sup>

### Recommendations

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Pursuant to the mandate imposed by Government Code Section 8290, the Commission recommends the repeal of the provisions referred to under "Report on Statutes Repealed by Implication or Held Unconstitutional," *supra*, to the extent they have been held unconstitutional and have not been amended or repealed.

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on the ground of race, religious creed, color, national origin, sex, age, or ancestry, and any remedy for a violation of such right is limited to those available under Title VII and the ADEA. To the extent, however, that FEHA provides other grounds for recovery or other forms of relief, the court found that FEHA would be preempted.

4. 120 S. Ct. 1022 (2000).

5. 120 S. Ct. 2402 (2000).

6. Proposition 198 (approved March 26, 1996), codified as Elec. Code §§ 2001, 2151, 13102, 13203, 13206, 13230, 13300, 13301, 13302.

7. Legislation repealing the amendments made by Proposition 198 and reenacting provisions similar to those in effect prior to 1996 providing for a "closed" partisan primary has been enacted. 2000 Cal. Stat. ch. 898 (SB 28).